



THE AMENDMENT OF THE CONSTITUTION UNDER -ARTICLE 368

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ABSTRACT :

A constitution is the main document of any country. The constitution goes about as the functioning record of the country. The change of this report every once in a while according to the prerequisites is perhaps of the main technique. India and the USA both have composed constitutions and the change technique of the constitution is written in both these constitutions. The revision system of the constitution differs from one country to another. This paper discusses the revision methodology of the Indian Constitution and American Constitution. The paper additionally analyzes the technique of alteration of the Indian Constitution and the Constitution of the USA. The state councils assume a part in both these change strategies. The constitution can't be corrected according to the desire of the councils. There should be sure cutoff points for altering the constitutions of the country. This paper discusses the constraints which are forced on the methodology while correcting the constitution in the two India as well as in the USA. The constitution is the contract of the nation and ought not be superfluously revised with a terrible expectation. The correction ought to be made exclusively to help people in general and shouldn't supersede the essential person of any country.

Keywords - Background of amendment, article 368, power, types of amendments, procedure.

Introduction :

“Part XX of the Constitution containing Article 368 is of the Constitution.” titled as “Amendment The time is not static, it goes on changing”. With it, the life of a nation also changes. The social, economic and political conditions of the people go on changing. Law, particularly the Constitutional law of the country, must also change in order to adapt it to the changing needs, the changing philosophy, the changing life, of the people. It, therefore, requires some mechanism for the law to serve the contemporary needs of the people. Such a mechanism is known as the amendment of the law, the amendment of the Constitution of the country.¹

Background of Indian Constitution :

In 1928, the All Parties Conference convened a committee in Lucknow to prepare the Constitution of India, which was known as the Nehru Report. Most of India was under direct British rule from 1857 to 1947. Upon independence, it became clear a new constitution was needed to be created. But for that, all of India needed to be brought into the union. This meant the Princely States needed to be convinced to become a part of the Indian Union either by force or diplomacy. Sardar Vallabhbhai Patel and V.P Menon did this unenviable task. Until this happened India was still legally a dominion under the British, responsible for external security.

Thus, the Constitution of India repealed the Indian Independence Act 1947 and Government of India Act 1935 when it became effective on 26 January 1950. India ceased to be a dominion of the British Crown and became a sovereign democratic republic with the Constitution.²

Scope of the Amending Power of the Parliament -

Since the commencement of the Constitution, a constitutional battle has been fought, in this regard, both in the Courts as well as, inside the Parliament. It appears that Parliament has been asserting its supremacy as enjoyed by the British Parliament, but the Supreme Court has been interpreting Parliament as a creature of the Constitution, exercising powers under and not beyond the Constitution. The Constitution, though expressly confers amending power on the Parliament, but it is the Supreme Court, which is to finally interpret the scope of such power and to spell out the limitations, if any, on such amending power.

Amendability of Fundamently Rights –

In the case of Kesavananda Bharati (1974), the Supreme Court declared that, under the Constitution's "Doctrine of Basic Structure," Parliament may amend any part of the Constitution, including all fundamental rights.

¹ Constitutional Law of India by Narender Kumar

²<https://byjus.com/free-ias-prep/historical-background-of-constitution-of-india/>

The Supreme Court has not publicly defined the Constitution's core structure, nor has it been stated in any comprehensive enumeration of its contents. However, the Supreme Court declared that only additions to the essential framework would be permissible, not removals. Any amendments to fundamental rights require a constitutional amendment that must be passed by both Houses of Parliament. To pass the modified measure, a special majority of Parliament is necessary. The amending power of the Parliament, came before the Supreme Court for the first time in *Shankari Prasad v. Union of India*. In this case, the constitutional validity of the Constitution (1st Amendment) Act, 1951, was challenged before the Supreme Court. The Constitution (1st Amendment) was enacted to remove certain difficulties brought to light by judicial pronouncements in regard to Fundamental Rights and the Directive Principles of State Policy.

Power to Amend the Constitution -

Article 368, as originally stood was titled as "Procedure for amendment of the Constitution" It conferred power on the Union Parliament to amend the Constitution. The Constitution (24th Amendment) Act, 1971 substituted the original Article 368 in the following respects:-

- a) The title is replaced by new title "Power to amend the Constitution and procedure therefor";
- b) The new Clause (1) confers on Parliament "the constituent power to amend the Constitution by way of addition, variance or repeal any provision of the Constitution";
- c) The new Clause (2) makes it obligatory for the President to give his assent to a Bill for amendment, presented to him, after being passed by both Houses of Parliament.

The Constitution (42nd Amendment) Act, 1976 further amended Article 368 to the effect declaring "the Constituent Power of Parliament as unlimited and absolute" and excluding interference by the Courts in the exercise of the power, on any ground.³

Procedure for Amendment of the Constitution -

Broadly speaking, there are two modes of amending the Constitution

- A. The informal method, and
- B. The formal method

A) Informal method of Amendment -

Under this method, the later of law does not change. but it's meaning and its import changes. This method includes amendment (1) by change. But, its hanging a well established convention and (ii) amendment by change in the interpretation of the provisions of the Constitution.⁴

B) Formal Method Of Amendment (under article 368) -

The constitution provides three modes of amending it's provision namely: (a) amendment by simple majority (b) amendment by special of in both Houseran Parliament plus ratification by at least half of the State Legislatures. Certain Provisions may be amended at the instance of the States. Besides, certain other provisions may be amended by the State Legislatures.⁵

a) Amendment by simple majority -

1. Several provisions in the Indian Constitution can be amended by a Simple Majority i.e. 50 percent of members present and voting.
2. It is to be noted that these amendments fall outside the scope of Article 368.
3. A few examples of the provisions that can be amended by simple majority are:
 - i. Admission or establishment of new states,
 - ii. ii) Formation of new states and alteration of areas, boundaries, or names of existing states,
 - iii. Abolition or creation of Legislative Councils in states, etc.⁶

b) By Special Majority of Parliament -

1. The majority of the provisions in the Constitution can be amended only by a Special Majority (more than 50 percent of the total membership of the House and a majority of two-thirds of the members of that House present and voting).
2. The provisions that can be amended by Special Majority are:
 - i. Fundamental Rights,
 - ii. Directive Principles of State Policy,
 - iii. All other provisions that are not covered by the first and third categories.⁷

³ Constitutional Law of India by Narender Kumar

⁴ Ibid

⁵ Ibid

⁶ <https://www.nextias.com/blog/amendment-of-the-constitution/>

C) By Special Majority of the Parliament and Consent of Half States -

- 1) The provisions of the Constitution that are related to the federal structure of the Indian polity require for their amendment a Special Majority of the Parliament along with the consent of half of the state legislatures by a Simple Majority.

The following points are to be noted w.r.t. these types of amendments:

- i) It does not require that all the states give their consent to the bill. The moment half of the states give their consent, the formality is completed and the bill is passed.
- ii) The constitution has not prescribed any time limit within which the states should give their consent to the bill.
- 2) A few examples of the provisions that can be amended this way are:
- i) Election of the President and its manner,
- ii) Extent of the executive power of the Union and the States,
- iii) Provisions related to the Supreme Court and High courts, etc.⁸

Limitation on power of amendment -

Biggest limitation is that the parliament cannot amend any of the basic provisions of the constitution which are prescribed in Article 368 of the constitution. Such a limitation came after various judicial decisions and is the result of a huge scuffle between the parliament and the judiciary. Finally, the judiciary's reasoning resonated with the Indian community and they laid down the concept of the basic structure of the constitution, which cannot be amended, in the Kesavananda Bharati Case.⁹ The basic structure is that part of the constitution that cannot be amended, it may or may not include the fundamental rights. An example would be, if the parliament wants to amend any provision which may be related to the concept of Equality, such an amendment will be scrutinised by the judiciary as equality is part of the basic structure of the constitution, which cannot be abridged by the parliament. Thus, if the amendment affects this basic feature, it will be void.¹⁰

Case Laws –

Sri Sankari Prasad Singh Deo v. Union of India 1951 -

In the case of Shankari Prasad vs Union of India, the Supreme Court of India upheld the validity of the First Constitutional Amendment Act, 1951. The petitioner challenged the amendment, which added Articles 31A and 31B to the Indian Constitution, arguing that it violated the fundamental right to property under Article 19(1)(f).

However, the Supreme Court in Shankari Prasad Case ruled that the Parliament had the power to amend the Constitution, including fundamental rights, under Article 368. The Court held that the amending power of the Parliament was very broad and could be used to alter any part of the Constitution, including fundamental rights. Shankari Prasad Case established the principle that the Parliament had the authority to amend fundamental rights through constitutional amendments.¹¹

2) Golaknath case of 1967 -

In the Golaknath case, SC held that the Parliament does not have the power to amend any fundamental rights.

The Court stated that the FRs are the heart and soul of the Indian Constitution. Therefore, FRs cannot be taken away, abridged, or curtailed by the amendments.

This judgment established that the fundamental rights¹² are beyond the amending power of the Parliament. Thus providing a solid foundation for the doctrine of the basic structure of Indian Constitution.

3) Kesavananda Bharati case of 1973 -

Kesavananda Bharati v. State of Kerala case judgment is the most important judgement in the legal history of India. The Kesavananda Bharati Case was associated with the validity of the 24th Constitutional Amendment Act 1971.

24th CAA prevents judicial review of amendments made to the Constitution.

It was argued in the Court that the 24th CAA violated the basic structure of Indian Constitution. Therefore it should be declared invalid and unconstitutional.

⁷ Ibid

⁸ Ibid

⁹See Kesavananda Bharati v. State of Kerala, AIR, 1973 SC 1461

¹⁰ <https://juriscentre.com/2021/06/25/constitutional-law-limitation-on-power-of-amendment/>

¹¹ <https://lawbhoomi.com/shankari-prasad-case-shankari-prasad-vs-union-of-india/#:~:text=The%20Court%20held%20that%20the,fundamental%20rights%20through%20constitutional%20amendments>

¹² https://en.m.wikipedia.org/wiki/I.C._Golaknath_and_Ors._vs_State_of_Punjab_and_Anrs.#:~:text=Golaknath%20v.,Fundamental%20Rights%20in%20the%20Constitution

In the Kesavananda Bharti case, SC held that Parliament has the power to amend the Constitution under Article 368. It also highlighted that this power is limited and not unlimited.

- 1) The Court established the concept of the "basic structure".
- 2) Court mentioned that basic structure refers to the core principles and values that form the foundation of the Constitution.
- 3) The judgement said that some important features of the Constitution are part of the basic structure of Indian Constitution. As these features are part of the Basic structure, they cannot be changed or destroyed by amendments. These important features include the following:
- 4) The Supremacy of the Constitution -
 - Democracy
 - Federalism
 - Secularism
 - The protection of fundamental rights¹³

Important Amendments in the Indian Constitution –

- **1st Amendment Act of 1951 -**
It added the Ninth Schedule of the Constitution which includes a list of Central and State laws that cannot be challenged in courts.
- **42nd Amendment Act of 1976 -**
Three terms (i.e., socialist, secular, and integrity) were added in the Preamble.
It added Fundamental Duties (new Part IVA) in the Constitution.
- **44th Amendment Act of 1978 -**
It replaced the term 'internal disturbance' with 'armed rebellion' which was related to National Emergency (Article 352).
It deleted the Right to Property from the Fundamental Rights and made it a legal right.
- **61st Amendment Act of 1988 -**
It lowered the voting age from 21 years to 18 years.
- **73rd Amendment Act of 1992 -**
It introduced the provisions related to Panchayati Raj Institutions, aiming to decentralize power to the grassroots level.
- **74th Amendment Act of 1992 -**
It introduced the provisions related to Urban Local Bodies, empowering Municipalities and Municipal Corporations.
- **86th Amendment Act of 2002 -**
It added that the State shall provide free and compulsory education to all children aged six to fourteen years.
- **97th Amendment Act of 2011 -**
This amendment gave constitutional status and protection to the cooperative societies.
- **101st Amendment Act of 2016 -**
It introduced the Goods and Services Tax (GST), a comprehensive indirect tax reform aimed at simplifying the tax structure and promoting economic integration.
- **102nd Amendment Act of 2018 -**
It gave Constitutional Status to National Commission for the Backward Classes.
- **103rd Amendment Act of 2019 -**
It provides 10% reservation for Economically Weaker Sections (EWS).
- **104th Amendment Act of 2020 -**
It provides for the reservation of seats in the Lok Sabha and State Legislative Assemblies for members of Scheduled Castes and Scheduled Tribes till 25th January 2030.
- **105th Amendment Act of 2021 -**
It revived the power of the State Governments to identify Socially and Educationally Backward Classes (SEBCs).
- **106th Amendment Act of 2023 -**
It reserves one-third of all seats for women in Lok Sabha, State Legislative Assemblies, and the Legislative Assembly of the National Capital Territory of Delhi, including those reserved for SCs and STs.¹⁴

Conclusion -

Through this article, we investigated the correction of the constitution. We observed that there is something many refer to as the Fundamental Design of the Constitution and it is contrary to the essential standards of equity to penetrate it. The legal executive was at first of the assessment that the preface comprised the fundamental construction of the constitution yet later on, it was decided that different parts of the constitution, for example, legal audit could likewise be the parts of the Essential Design of the Constitution. The public authority in numerous milestone cases attempted to alter the constitution to make it more straightforward to guarantee the best for the public interest. The legal executive was totally against the entire thought, in later decisions we see the appointed authorities opening up to the possibility of the leader having the option to supersede specific parts of the essential

¹³<https://testbook.com/ias-preparation/landmark-cases-relating-basic-structure-constitution>

¹⁴<https://www.nextias.com/blog/amendment-of-the-constitution/>

construction to guarantee the best for the public interest. However, in later on decisions, except if the legal executive was totally persuaded that such Demonstrations would be helpful in guaranteeing more prominent public government assistance, they were severe about alterations that disregarded the fundamental design. What we should acknowledge is that the constitution is the foundation of this majority rule government. While it was progressive of the dads of our constitution to give arrangements to revise the constitution, fundamental such arrangements are not abused. Abuse could bring about unnecessary force of the administrative or the chief which could tear the texture of our majority rule government.

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